Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

James J. Armstrong and Nancy L. Armstrong,
Petitioners,

v.

Colonial Bank, N.A.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

James J. Armstrong, *Pro Se*
Nancy L. Armstrong, *Pro Se*
Petitioners
1974 Bayhill Drive
Melbourne, Fl 32940
(321) 253-3636

QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit erred in affirming the dismissal of an action for usury by sanctioning a holding or dispositive rule of law that precludes an inquiry into or determination of any issues of material fact?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....(i)
TABLE OF CONTENTS .....(ii)
TABLE OF CITATIONS.....(iv)
OPINIONS BELOW.....1
BASIS FOR JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS.....1
STATEMENT OF THE CASE.....2
REASONS FOR GRANTING THE PETITION.....4

I. A HOLDING OR DISPOSITIVE RULE OF LAW THAT "ANY CHARGES LABELED AS OVERDRAFT FEES ARE NOT INTEREST AND, ACCORDINGLY, CANNOT BE USURIOUS", IGNORES AND EFFECTIVELY OVERRULES RELEVANT DECISIONS OF THIS COURT WITH RESPECT TO (i) THE IMPORTANCE OF A TRANSACTION'S SUBSTANCE, RATHER THAN FORM, (ii) THE NEED FOR UNCONTROVERTED ALLEGATIONS OF A COMPLAINT TO BE CONSTRUED MOST FAVORABLY TO THE PLEADER, AND (iii) THE CONSTITUTIONAL RIGHT TO HAVE DISPUTED ISSUES OF MATERIAL FACT DETERMINED BY A JURY. 4

A. *Video Trax, Inc. v. NationsBank, Inc.* is not dispositive legal precedent for the contention that overdraft fees cannot be interest.....7

B. Legal precedents of this Court require usury to be determined by the substance, rather than the form of a transaction.....9

C. Legal precedents of this Court require the uncontroverted allegations of the complaint to be construed in the manner most favorable to the pleader's legal claims.....11

D. Legal precedents of this Court recognize and protect the constitutional right to have disputed issues of material fact determined at trial by a jury.....13

CONCLUSION.....15

APPENDIX A
Order of Dismissal of U.S. District Court for the Middle District of Florida.....1a

APPENDIX B
Judgment of U.S. Court of Appeals for the Eleventh Circuit affirming the District Court's Order.....3a

APPENDIX C
Denial of Rehearing En Banc of the U.S. Court of Appeals for the Eleventh Circuit.....6a

APPENDIX D
Constitutional and Statutory Provisions.....7a

APPENDIX E
Video Trax, Inc. v. NationsBank, N.A., Id., 33 F.Supp.2d 1041 (S.D. Fla. 1998), *aff'd* 205 F.3d 8 (11th Cir. 2000), *cert. denied* 531 U.S. 822 (2000).....13a

APPENDIX F
Kathy Chu, *FLORIDA TODAY*, BUSINESS, November 21, 2006, at pages 1C-2C.....53a

TABLE OF CITATIONS

Cases

American Acceptance Corporation v. Schoenthaler, 391 F.2d 64 (5th Cir. 1968).....9

Andrews v. Pond, et al, 38 U.S. 65 (1839).....9, 14

Atwood et ux. V. Deming Inv. Co. et al, 55 F.2d 180 (5th Cir. 1932).....9

Beausejour Corporation, N.V. v. Offshore Development Company, Inc., 802 F.2d 1319 (11th Cir. 1986).....9, 10

Chauffeurs, Teamsters and Helpers Local 39 v. Terry, 494 U.S. 558 (1990).....13

Cockle et al v. Flack et al, 93 U.S. 344 (1876)....10, 13, 15

Colgrove v. Battin, 413 U.S. 149, 93 S.Ct. 2448 (1973).....10, 13, 15

Conley v. Gibson, 355 U.S. 41 (1957).....11,12

Curtis v. Loether et al, 415 U.S. 189, 94 S.Ct. 1005 (1974).....10, 13

Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367 (11th Cir. 1998).....12

Hodges v. Easton, 106 U.S. 408, 1 S.Ct. 307 (1982).....13, 14

Missouri, K. & T. Trust Co. v. Krumseig et al, 172 U.S. 351, 19 S.Ct. 179 (1899).....10, 13

Moore v. Comfed Savings Bank, 908 F.2d 834 (11th Cir. 1990) 10

Sachs et al. v. Ginsberg, 87 F.2d 28 (5th Cir. 1936) 10

Scheuer v. Rhodes, 416 U.S. 232 (1974) 12

Scott v. Lloyd, 34 U.S. 418 (1835) 10, 13

Video Trax, Inc. v. NationsBank, N.A., 33 F.Supp.2d 1041 (S.D. Fla. 1998), *aff'd* 205 F.3d 8 (11th Cir. 2000), *cert. denied* 531 U.S. 822 (2000) 2, 5, 6, 7, 8, 13, 14, 15

Constitutional and Statutory Provisions

U.S. Constitution, Amendment Seven 13

12 U.S.C. § 85 1

18 U.S.C. § 1964(a) 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

Florida Statutes § 687.03(1) 4, 9

Florida Statutes § 687.071(2)(3)(4) 4, 10

Other Sources

Black's Law Dictionary (Revised Fourth Edition, 1968) 5

Kathy Chu, *FLORIDA TODAY*, BUSINESS, November 21,2006, at pages 1C-2C 4

OPINIONS BELOW

The District Court's order of dismissal (Doc 26) is reprinted in Appendix A of the Petition Appendix ("Pet. App.") at pages 1a and 2a. The judgment of the Eleventh Circuit's three judge panel of Circuit Judges Tjoflat, Dubina, and Hull is reprinted in Appendix B of the Pet. App. at pages 3a, 4a, and 5a. The Eleventh Circuit's denial of the petitioner's Petition for Rehearing En Banc is reprinted in Appendix C of the Pet. App. at page 6a.

BASIS FOR JURISDICTION

A **Subject Matter Jurisdiction in the District Court.**
The district court had original jurisdiction pursuant to the National Bank Act, 12 U.S.C. § 85, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(a).

B **Jurisdiction in the Court of Appeals.**
The Court of Appeals for the Eleventh Circuit had jurisdiction to hear this case pursuant to 28 U.S.C.§1291 and mandated its Judgment on November 22, 2006.

C. **Jurisdiction in United States Supreme Court**
This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions involved in this case are set forth in Appendix D, of the Petition Appendix.

STATEMENT OF THE CASE

This case challenges the ability of a National Bank to assess and collect usurious interest under the guise and in the form of "overdraft fees".

The Armstrongs filed their original complaint on December 8, 2005, in the Circuit Court of Brevard County, Florida. (Doc 2) On January 10, 2006, Colonial Bank filed its notice of removal (Doc 1), the Armstrongs' original complaint (Doc 2), and Colonial's motion to dismiss for failure to state a cause of action (Doc 3) in the United States District Court for the Middle District of Florida, Orlando Division. On January 27, 2006, the Armstrongs filed their amended complaint. (Doc 10) On February 9, 2006, Colonial filed its motion to dismiss the Armstrongs' amended complaint for failure to state a cause of action, and on February 10 and 13, 2006, Colonial filed its corrected motion to dismiss and memorandum of law. (Doc 21) On February 21, 2006, the Armstrongs filed their response to Colonial's corrected motion to dismiss the amended complaint for failure to state a cause of action. (Doc 22)

On April 3, 2006, the District Court granted Colonial Bank's motion to dismiss the Armstrongs' amended complaint solely upon its finding that: "Overdraft charges are not interest and, accordingly, cannot be usurious. *Video Trax, Inc. v. NationsBank, N.A.*, 33 F.Supp. 2d 1041, (S.D. Fla. 1998), aff'd 205 F.3d 1358 (11th Cir. 2000)." (Doc 26; Appendix A)

On April 12, 2006, the Armstrongs' notice of appeal from the District Court's final order of dismissal (Doc 27) was timely filed with the United States Court of Appeals for the Eleventh Circuit. On September 26, 2006, a three judge panel comprised of Circuit Judges Tjoflat, Dubina, and Hull affirmed the judgment of the District Court (Appendix B) for the reasons stated in the district court's order of dismissal. (Doc 26; Appendix A)

On October 12, 2006, the Armstrongs timely filed their petition for rehearing en banc with the Eleventh Circuit. This petition for rehearing was denied on November 14, 2006, without any Judge having requested the Court to be polled on the rehearing en banc. (Appendix C) The Judgment of the Eleventh Circuit was mandated on November 22, 2006. (Appendix B)

REASONS FOR GRANTING THE PETITION

I. A HOLDING OR DISPOSITIVE RULE OF LAW THAT "ANY CHARGES LABELED AS OVERDRAFT FEES ARE NOT INTEREST AND, ACCORDINGLY, CANNOT BE USURIOUS", IGNORES AND EFFECTIVELY OVERRULES RELEVANT DECISIONS OF THIS COURT WITH RESPECT TO (i) THE IMPORTANCE OF A TRANSACTION'S SUBSTANCE, RATHER THAN FORM, (ii) THE NEED FOR UNCONTROVERTED ALLEGATIONS OF A COMPLAINT TO BE CONSTRUED MOST FAVORABLY TO THE PLEADER, AND (iii) THE CONSTITUTIONAL RIGHT TO HAVE DISPUTED ISSUES OF MATERIAL FACT DETERMINED BY A JURY.

The subject matter of this case is not unique to the Armstrongs, but rather is reflective of a topical issue in which both the general public and the financial services community have a stake. According to USA TODAY'S Kathy Chu, "[Overdraft] fees make up 90% of service charges on deposit accounts, and they're expected to yield a record $53.1 billion for financial institutions this year..."FLORIDA TODAY, BUSINES, November 21, 2006, at page 1C-2C. (Appendix F at page 50a)

In the case now before this Court, the Eleventh Circuit has sanctioned a form of deception by which federal depositories are able to solicit nominal deposits in order to advance and collect funds at yields that greatly exceed the statutory usury rates of the State of Florida, *See* Florida Statutes § 687.03(1) Appendix F at page 33a and § 687.071Appendix F at page 33a. Further, the EleventhCircuit's observance of form over substance threatens the meaningful application of every State's usury laws to resident national banks, redefines the prohibited collection of unlawful debts under the Racketeer Influenced

and Corrupt Organizations Acts. and undermines Truth-in-Lending's uniform disclosure of credit costs under the Consumer Credit Protection Act.

Notwithstanding relevant decisions of this Court which dictated a much different course in the judicial proceedings of this case, the District Court (Doc 26; Appendix A) and the Court of Appeals for the Eleventh Circuit (Appendix B) have held that the dismissal of the petitioners' complaint is required by *Video Trax, Inc. v. NationsBank, N.A.*, 33 F.Supp.2d 1041 (*s.d.* Fla. 1998), *aff'd* 205 F.3d 8 (11th Cir. 2000),*cert. denied* 531 U.S. 822 (2000). In each instance the court looks to *Video Trax, Inc. v. NationsBank, N.A., Id.*, as establishing a dispositive rule of law that precludes an overdraft fee, and implicitly any portion of an overdraft fee, from constituting interest or resulting in usury.

In erroneously concluding that *Video Trax, Inc. v. NationsBank, N.A., Id.*, is dispositive legal precedent, the District Court and the Eleventh Circuit failed to discern or observe the difference between the general application of a "rule of law", and a specific decision made as a "matter of law" in the absence of any disputed material facts. *See Black's Law Dictionary*, pages 1130 and 1497, (revised Fourth Edition, 1968). The summary judgment granted in *Video Trax, Inc v. NationsBank , N.A., Id.* was granted only after the parties to that case conceded "....that no disputed issues of fact exist to preclude judgment as a matter of law....", *Id.* at 1044. As evidenced by the analysis of Judge Gold's opinion set forth in subpart I. A, below, the conclusion of the trial court in *Video Trax* was expressly limited to the "...OD [overdraft] fees at issue...." and "...the [NationsBank] deposit agreement...", *Id.* at 1059, in the case before it on cross motions for summary

judgment. *Id.* at 1044.

In its motion for dismissal in this case (Doc 19 - Pg 1), Colonial Bank has argued that the Eleventh Circuit, as a result of its appellate review of the summary judgment in *Video Trax, Inc. v. NationsBank, N.A., Id.*, already expressly rejected the claims asserted in the Armstrongs' amended complaint. (Doc 21 - Pg 1) Such an argument is frivolous. In actual fact, the allegations and issues of fact in this case were never presented or adjudicated in *Video Trax, Inc. v. NationsBank, N.A., Id.*, and the parties in this case never participated or had the opportunity to participate in *Video Trax, Inc. v. NationsBank, N.A., Id.*. Unlike *Video Trax, Inc. v. NationsBank., N.A., Id.*, the dismissal of the petitioners' amended complaint in this case cannot be attributed to a stipulation of material facts by the parties or any finding of fact by the trial judge.

By sanctioning a dispositive rule of law under which charges denominated or labeled as overdraft fees "...are not interest and, accordingly, cannot be usurious" (Doc 26 pg. 1; Appendix A) the Eleventh Circuit has ignored and effectively overruled relevant decisions of this court with respect to (i) the importance of a transaction's substance, rather than form, (ii) the need for uncontroverted allegations of a complaint to be construed most favorably to the pleader, and (iii) the constitutional right to have disputed issues of material fact determined by a jury.

With the filing of this petition of writ of certiorari, the petitioners must look to the exercise of this Court's supervisory powers to determine whether this case is at its beginning or its end. Moreover, this Court's response to the rogue judgment entered in this case by Circuit Judges Tjoflat, Dubina, and Hull will importantly determine the future of federal judiciary and the ability of loan sharks to exploit the citizenry of our United States.

A. *Video Trax, Inc. v. NationsBank, Inc., Id.*, is not dispositive legal precedent for the contention that overdraft fees cannot be interest.

The trial judge in *Video Trax, Inc. v. NationsBank, N.A., Id.*, only opined as to whether the overdraft fees assessed and collected by NationsBank were interest. As clearly set forth in the second paragraph of Judge Gold's opinion, "...the contested charges [the overdraft fees of Nations Bank] do not constitute interest, and thus, the transaction was not usurious." *Video Trax, Inc. v. NationsBank, N.A., Id.* at page 1044 (emphasis added). The undisputed facts were that NationsBank charged the same flat $25 fee (later $27) for both overdrafts honored by the bank and checks returned for insufficient funds. As to any funds which it chose to advance with respect to overdrafts, NationsBank additionally "...charged interest on the overdraft sums... subject to the maximum rate permissible by law." *Video Trax, Inc. v. NationsBank, N.A., Id.*, at page 1045 (emphasis added).

It is within this context that Judge Gold concluded the flat $25 ($27) fee was not charged in connection with an extension of credit and did not constitute interest. *Video Trax, Inc. v. NationsBank, N.A., Id.*, at pages 1050 and 1059.

Colonial Bank, the defendant in this case, charges a separate $30 "Non-sufficient Available Funds Fee" for checks returned to the presenter uncollected. Colonial Bank's "Overdraft Fee" is only charged with respect to sums voluntarily advanced by Colonial Bank to cover insufficient

account balances. Unlike the undisputed facts in *Video Trax, Inc. v. NationsBank, N.A., Id.*, the overdraft fee in this case is $30 per item, plus $3.00 per day for each day the account balance remains overdrawn. (Doc 10 Pg 6, 7) Unlike NationsBank, Colonial Bank neither identifies nor purports to charge any "interest" on the funds it unilaterally decides to advance to create overdrafts. It is unreasonable to believe Colonial Bank, a for-profit public corporation, advances funds without charging compensation for the use of its money ("interest"). Accordingly, the Armstrongs have alleged and at trial would show, amongst other things, that Colonial Bank's Overdraft Fees are a "... device or artifice employed by defendant [Colonial Bank, N.A.] to obtain unlawful compensation for funds voluntarily advanced..." and such fees "...in whole or in part, ...constitute usurious interest". (Doc 10 Pg 11)

The petitioners in this case believe *Video Trax, Inc. v. NationsBank, N.A., Id.*, was correctly decided on its merits at the trial level and properly affirmed by the Eleventh Circuit. While the petitioners do not agree with various aspects of Judge Gold's rather extensive *dicta,* the accuracy or inaccuracy of such *dicta* was not relevant to the holding in that case and is not relevant to the matter now before this Court.

The central and still undetermined factual issue in this case is the extent to which Colonial Bank's "Overdraft Fee" constitutes interest, as defined under Florida's usury laws to include any

> "... reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest." Florida Statutes § 687.03(1) (emphasis added)

B. Legal precedents of this Court require usury to be determined by the substance, rather than the form of a transaction.

The State of Florida has enacted laws that expressly undertake to prevent evasion of the State's usury laws "...by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever...". Florida Statutes § 687.03(1) In the federal courts this rather traditional social value is achieved by the relevant legal precedents that require usury to be determined upon the substance, rather than the form of a transaction. *American Acceptance Corporation v. Schoenthaler*, 391 F.2d 64 (5th Cir. 1968); *Andrews v. Pond*, et al, 38 U.S. 65 (1839); *Atwood et ux. v. Deming Inv. Co. et al*, 55 F.2d 180 (5th Cir. 1932); *Beausejour Corporation, N.V. v. Offshore*

Development Company, Inc., 802 F.2d 1319 (11th Cir. 1986); *Cockle et al v. Flack et al*, 93 U.S. 344 (1876); *Colgrove v.Battin*, 413 U.S. 149, 93 S.Ct. 2448 (1973); *Curtis v. Loether et al*, 415 U.S. 189 94 S.Ct. 1005 (1974); *Missouri, K. & T. Trust Co. v. Krumseig et al*, 172 U.S. 351, 19 S.Ct. 179 (1899); *Moore v. Comfed Savings Bank*, 908 F.2d 834 (11th Cir. 1990); *Sachs et al. v. Ginsberg*, 87 F.2d 28 (5th Cir. 1936); *Scott v. Lloyd*, 34 U.S. 418 (1835).

Chief Justice Marshall's insight on usury remains as true today as it was in 1835.

> "The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute may be evaded. *** Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it." *Scott v. Lloyd, Id*, at page 419.

Florida has defined the act of unlawfully extending credit at interest rates exceeding 25% to be "loan sharking" subject to criminal penalties. *Florida Statutes* § 687.071(1)(g)(2) and (3). Using this standard as a public policy benchmark, both the State of Florida and the federal courts should be concerned when Colonial Bank charges an overdraft fee that can result in annualized yields exceeding seventy thousand percent (70,000%). For example, when $17 is advanced to cover the

shortfall in an account, the one day overdraft fee of $33 results in an annualized yield of approximately 70,852%.

It is a social and economic imperative that this Court use its supervisory power to promptly restore the federal courts' traditional criteria of "substance, rather than form" as the basis for making a factual dermination of interest or usury.

C. Legal precedents of this Court require the uncontroverted allegations of the complaint to be construed in the manner most favorable to the pleader's legal claims.

The District Court's dismissal of the Armstrongs' amended complaint for failure to state a cause of action was fundamental error. Accordingly, the Eleventh Circuit's affirmation of the District Court's order of dismissal sanctions such a radical departure from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's supervisory power. The following standard of review, as stated in relevant decisions of this Court and previous decisions of both the Fifth and Eleventh Circuits, has become an integral part of the judicial process :

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ***

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader. 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (footnote omitted); *Scheuer v. Rhodes*, 416 U.S. 232 (1974)." *See also, Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998).

The elements of usury, as set forth in *Video Trax, Id.* at 1056, have been adequately pled and at trial would be sufficiently evidenced for the finder of fact. (Doc 10 Pg 6, 7, 8, 9, 10) The allegations of the amended complaint, including without limitation the substantive nature of the Overdraft Fee, required that Colonial Bank's motion to dismiss be denied.

In granting Colonial Bank's motion to dismiss, both the District Court and the three judge panel of the Eleventh Circuit ignored (a) the uncontroverted allegations set forth in the Armstrongs' amended complaint (Doc 10), and (b) the legal precedents of this Court that require usury to be determined upon the substance, rather than the form of a transaction. *Cockle et al v. Flack et al*, 93 U.S. 344 (1876); *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448 (1973); *Curtis v. Loether et al*, 415 U.S. 189, 94 S.Ct. 1005 (1974); *Missouri, K. & T. Trust Co. v. Krumseig et al*, 172 U.S. 351, 19 S.Ct. 179 (1899);and, *Scott v. Lloyd*, 34 U.S. 418 (1835).

D. Legal precedents of this Court recognize the constitutional right to have disputed issues of material fact determined at trial by a jury.

The Armstrongs have demanded a trial by jury (Doc 10 Pg 10), as is their constitutional right under Amendment Seven to the Constitution of the United States of America. *Curtis v. Loether et al*, 415 U.S. 189, 94 S.Ct. 1005 (1974); *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558 (1990); *Hodges v. Easton*, 106 U.S. 408, 1 S.Ct. 307 (1982).

> "In civil cases, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, 'the trial of issues of fact' - that is, of all the material issues of fact - 'in the circuit courts shall be by jury,' unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury." *Hodges v. Easton, Id.*, at page 412.

The opinion in *Video Trax, Inc. v. NationsBank, N.A., Id.*, does not undertake to diminish or preclude the constitutional right to have disputed material facts determined by a jury. Rather, the opinion was predicated on cross motions for summary judgment and the total absence of any disputed material facts. *Video Trax, Inc., Id. v.NationsBank, N.A., Id.* at page 1044. It was solely upon this basis that Judge Gold could correctly opine that the overdraft fees assessed by NationsBank were not interest. While the affirmation of Judge Gold's opinion by the Eleventh Circuit may add to its value as precedent for an identical or substantially similar case, the rather limited application of *Video Trax, Inc., v. NationsBank, N.A., Id.* remains constant, unchanged, and essentially inapplicable to the case before this Court.

With respect to an action for usury, the issues of fact to be determined by a jury include without limitation the determination of (a) the real nature of a transaction's form, (b) the existence of the requisite corrupt intent, and (c) the finding of usury. *Andrews v. Pond*, et al, 38 U.S. 65(1839;

Cockle et al v. Flack et al, 93 U.S. 344 (1876); *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448 (1973). See *Video Trax, Inc., Id. v. NationsBank, N.A., Id.* at 1056 for the elements of usury in Florida.

While the nature and extent of the disputed material facts in this case remains undetermined in the absence of any responsive pleading or the completion of discovery, all disputed material facts sufficiently supported by the evidence must ultimately be submitted to a jury for determination.

CONCLUSION

For the foregoing reasons, the plaintiffs' petition for writ of certiorari should be granted, and this court should reverse the order dismissing the case with prejudice and remand the case to the District Court for trial on its merits.

Respectfully submitted,

JAMES J. ARMSTRONG, PRO SE
NANCY L. ARMSTRONG, PRO SE
Petitioners
1974 Bayhill Drive
Melbourne, Florida 32940
(321) 253-3636

Supreme Court, U.S.
F I L E D

061130 FEB 09 2007

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In The

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v.

Colonial Bank, N.A.,
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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APPENDIX TO PETITION

James J. Armstrong, *Pro Se*
Nancy L. Armstrong, *Pro Se*
Petitioners
1974 Bayhill Drive
Melbourne, Fl 32940
(321) 253-3636

TABLE OF CONTENTS

APPENDIX A
Order of Dismissal of U.S. District Court for the Middle District of Florida 1a

APPENDIX B
Judgment of U.S. Court of Appeals for the Eleventh Circuit affirming the District Court's Order 3a

APPENDIX C
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APPENDIX D
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APPENDIX F
Kathy Chu, *FLORIDA TODAY*, BUSINESS, November 21, 2006, at pages 1C-2C 53a

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:06-cv-38-Orl-22KRS

JAMES J. ARMSTRONG and NANCY L. ARMSTRONG,
Plaintiffs,

-vs-

COLONIAL BANK, N.A.,
Defendant.
_____/

ORDER

Upon the court's review of this case, it is ORDERED as follows:

1. Defendant's Motion to Dismiss Amended Complaint (Doc. 21), filed February 10, 2006, is GRANTED. Overdraft charges are not interest and, accordingly, cannot be usurious. *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041, 1047-55 (S.D.Fla. 1998), *aff'd*205F.3d 1358 (11th Cir. 2000) ("For the reasons stated by the district court, [33 F. Supp. 2d] at 1047-55(part III.A. through III.C.), we find that the fees at issue do not constitute 'interest' for purposes of the usury provisions of the National Bank Act, 12 U.S.C. §§85-86 (1994)"). This determination is fatal to all of the Plaintiffs' claims (usury, civil theft, federal RICO, and conversion).

2. Plaintiffs' Motion for Leave to File Amended Pleading (Doc. 23), filed February 21, 2006, is DENIED. In light of the ruling set forth in paragraph 1, supra, amendment would be futile. Additionally , the Motion fails to comply with Local Rule 3.01(g).

3. Plaintiffs' Motion for Enlargement of Time (Doc. 25), filed March 13,2006, is MOOT. Additionally, the Motion fails to comply with Local Rule 3.01(g).

4. The Amended Complaint is DISMISSED, WITH PREJUDICE.

5. The Clerk shall close this case. **DONE** and **ORDERED** in Chambers, in Orlando, Florida on April 3, 2006.

/S/ *ANNE C. CONWAY*
ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party

APPENDIX B

United States Court of Appeals
For the Eleventh Circuit

No. 06-12310
District Court Docket No.
06-00038-CV-ORL-22-KRS

FILED

U.S COURT OF APPEALS
ELEVENTH CIRCUIT
Sep 26, 2006

THOMAS K KHAN
CLERK

JAMES R. ARMSTRONG,
NANCY ARMSTRONG,
Plaintiffs-Appellants,
versus
COLONIAL BANK, N.A.,
Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Florida
JUDGEMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgement of this Court.
Entered: September 26, 2006
For the Court: Thomas K. Kahn, Clerk
By: Harper, Toni

ISSUED AS MANDATE
NOV 22 2006
U.S. COURT OF APPEALS
ATLANTA, GA.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12310
Non-Argument Calendar

FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

September 26, 2006
THOMAS K. KAHN
CLERK
D.C. Docket No. 06-00038-CV-ORL-22KRS

JAMES R. ARMSTRONG,
NANCY ARMSTRONG,
Plaintiffs-Appellants,

versus

COLONIAL BANK, N.A.
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
(September 26, 2006)
Before TJOFLAT, DUBINA and HULL, Circuit Judges.
PER CURIAM:
We affirm the judgement of the district court dismissing appellants' amended complaint for failure to state a claim

for relief. See Fed. R. Civ. P. 12(b)(6). Record Vol 1, at Tab 26. We conclude that appellants' claim is foreclosed for the reasons stated in the district court's order of dismissal. *Id.*

AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12310
FILED U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 14 2006
THOMAS K. KAHN
CLERK

JAMES R. ARMSTRONG,
NANCY ARMSTRONG,
Plaintiffs-Appellants,
versus
COLONIAL BANK, N.A.,
Defendant -Appellee.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC Before: TJOFLAT, DUBINA and HULL, Circuit Judges. PER CURIAM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ Tjoflat
TJOFLAT
UNITED STATES CIRCUIT JUDGE
ORD-42

(2/05)

APPENDIX D

U.S. Constitution, Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

12 U.S.C. § 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statues.

When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever

may be the g greater, and such interest may be taken in advan nce, reckoning the days for which the note, bill, or other evidence of debt has to run. The ma aximum amount of interest or discount to t be charged at a branch of an association lo ocated outside of the States of the United Sta ates and the District of Columbia shall be at the ra rate allowed by the laws of the country, territory, depen ndency, province, dominion, insular possession, or other political subdivision where the branch is l located. And the purchase, discount, or sale of a b bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, a at not more than the current rate exchange for sight dra afts in addition to the interest, shall not be c considered as taking or receiving a greater rate of i interest.

18 U.S.C. § 1964. Ci ivil remedies

(a) The district t courts of the United States shall have jurisdictio n to prevent and restrain violations of section 19 962 of this chapter by issuing appropriate ord ders, including, but not limited to: ordering any person to divest himself of any interest, d direct or indirect, in any enterprise; imp posing reasonable restrictions on the future activitie es or investments of any person, including, but t not limited to, prohibiting any person from engaging in the same type of endeavor as t the enterprise is engaged in, the activities of v which affect interstate or foreign commerce; or ord dering dissolution or reorganization of any enterprise, makin ng due provision for the rights of innocent persons.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

***

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Florida Statutes 687.03 "Unlawful rates of interest" defined; proviso.

(1) Except as provided herein, it shall be usury and unlawful for any person, or for any agent, officer, or other representative of any person, to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other

obligation a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest. However, if any loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds $500,000 in amount or value, it shall not be usury or unlawful to reserve, charge, or take interest thereon unless the rate of interest exceeds the rate prescribed in s.687.071. The provisions of this section shall not apply to sales of bonds in excess of $100 and mortgages securing the same, or money loaned on bonds.

Florida Statutes. § 687.071. Criminal usury, loan sharking; shylocking

(1) Definitions. -- The following words and phrases, as used in this section, shall have the following meanings:

(a) "Person" shall be construed to be defined as provided in s.1.01.

(b) "Creditor" means any person who makes an extension of credit or any person claiming by, under, or through such person.

(c) "Debtor" means any person who receives an extension of credit or any person who guarantees the repayment of a loan of money for another person.

(d) "Extension of credit" means to make or renew a loan of money or any agreement for forbearance to enforce the collection of such loan.

(e) "Extortionate extension of credit" means any extension of credit whereby it is the understanding of the creditor and the debtor at the time an extension of credit is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(f) "Loan shark" or "shylock" means any person as defined herein who lends money unlawfully under subsection (2), subsection (3), or subsection (4).

(g) "Loan sharking" or "shylocking" means the act of any person as defined herein lending money unlawfully under subsection(2), subsection (3), or subsection (4).

(2) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take, or receive interest thereon at a rate exceeding 25 percent per annum but not in excess of 45 percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a misdemeanor of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

(3) Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding 45 percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

(4) Any person who shall knowingly and willfully make an extortionate extension of credit to any person or conspire to do so

shall be guilty of a felony of the second degree, punishable as provided in s. 775,082, s.775.083, or s.775.084. In any prosecution under this subsection, evidence that the creditor then had a reputation in the debtor's community for the use or threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person to collect extensions of credit or to punish the nonrepayment thereof shall be admissible.

(5) Books of account or other documents recording extensions of credit in violation of subsections (3) or (4) are declared to be contraband, and any person, other than a public officer in the performance of his or her duty, and other than the person charged such usurious interest and person acting on his or her behalf, who shall knowingly and willfully possess or maintain such books of account or other documents, or conspire so to do, shall be guilty of a misdemeanor of the first degree, punishable as provided in s.775.082 or s.775.083.

(6) No person shall be excused from attending and testifying or producing any books, paper, or other document before any court upon any investigation, proceeding, or trial, for any violation of this section upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of the person may tend to convict him or her of a crime or subject the person to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he or she may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against the person upon any criminal investigation or proceeding.

(7) No extension of credit made in violation of any of the provisions of this section shall be enforceable debt in the courts of this state.

APPENDIX E

United States District Court, S.D. Florida.
VIDEO TRAX, INC., a Florida corporation on behalf of itself and all other persons and entities similarly situated,

Plantiff,
v.
NATIONSBANK N.A.,
a national banking association,
Defendant.

No. 97-1586-CIV.
Dec. 10 1998.

Business checking account holder commenced action against nationally chartered bank alleging that overdraft fee charged by bank was subterfuge to exact usurious rate of interest in violation of National Bank Act. On cross-motions for summary judgement, the District Court, Gold, J., held that (1) Act did not preempt all state laws regarding charges and fees; (2) overdraft fee was not "interest" for purposes of Act; (3) overdraft fee charged by bank was reasonable; (4) overdraft fee was not interest under Florida law; (5) overdraft fee was not an extension of credit or loan; and (6) overdraft fee was not usurious under Florida law.

So ordered.

ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGEMENT AND DENYING PLAINTIFFS MOTION FOR SUMMARY JUDGEMENT

GOLD, District Judge.

THIS CAUSE is before the Court upon cross motions for summary judgement by Plaintiff, Video Trax, Inc ("Plaintiff"), and Defendant NationsBank, N.A. ("Defendant"). Plaintiff brought this class action pursuant

to the National Bank Act, 12 U.S.C. § § 85 and 86 (the "Bank Act"). Plaintiff alleges that the Overdraft Item Fee (the "OD fee") on checking accounts charged by Defendant, a national banking association, was actually a subterfuge to exact a usurious rate of interest in violation of the Bank Act. Defendant avers that the OD fee was an administrative cost to cover the processing of checks drawn in excess of the collected balance in depositor's account, and was not interest as contemplated by the Bank Act and Florida's usury statute, § § 687.01, *et seq.*, Fla.Stat. Therefore, according to Defendant, since the OD fee is not "interest," it is not usurious.

The parties request the Court to determine, as a matter of law, whether the OD fee is really interest, based on an extension of credit to cover checks in excess of Plaintiff's uncollected balance in its business checking account. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1331, as arising under federal law. After careful consideration of the parties' arguments, the relevant case law and the record as a whole, and being otherwise advised in the premises, the Court concludes that the contested charges do not constitute interest, and thus, the transaction was not usurious.

I. Factual and Procedural Background

The parties concede that no disputed issues of fact exist to preclude judgement as a matter of law. The undisputed facts in the record reveal that Defendant is a nationally chartered banking institution, organized and existing under the laws of the United States. At all relevant times, Defendant was authorized to transact, and was transacting, business in branch offices located in the State of Florida.

FN1. Under our dual banking system, commercial banks have the option of being federally or state chartered. Federally chartered, or national, banks are governed by the National Bank Act of 1874, 12 U.S.C. § § 21, *et seq.*, which sets forth chartering criteria, basic banking and investment powers, lending and borrowing limitations, and corporate powers and duties. As required members of the Federal Reserve System and insured by the Federal Deposit Insurance Corporation ("FDIC"), national banks are also subject to the Federal Reserve Act, 12 U.S.C. § § 221-522, and the FDIC Act, 12 U.S.C. § § 1811, *et seq.*

Plaintiff is a corporation organized under the laws of the State of Florida. FN2 At all times relevant to this cause, Plaintiff was authorized to do business, and was conducting business, in Dade County, Florida.

FN2 On February 2, 1998, the Court entered an agreed order pursuant to the parties' Joint Stipulation and Agreement Regarding Class Certification. It was agreed that the class would be defined as the holders of commercial and other non-consumer business deposit accounts opened in Florida with Defendant, and its predecessors, who at any time during the two years preceding commencement of this action on May 20, 1997, were charged interest and/or OD fees or similar fees as a result of the presentment and payment of checks drawn on their respective accounts at times when uncollected or insufficient funds existed in the accounts, which interest and/or OD fees, if legally required to be included for the purpose of calculating interest, would result in a usurious rate of interest. Notice to the class was deferred until such time as the Court deemed necessary for notice to be extended to potential class members. As of this date, no notice has been forwarded, nor has the Court been requested to address this issue.

On June 10, 1992, Plaintiff opened a Simple Analysis Business Checking account at NCNB National Bank of Florida, N.A., Defendant's predecessor. The obligations of the parties were governed by signature cards, deposit

agreements, and schedules of fees in effect from the inception of the account until the account was terminated on February 18, 1997.

[1] As evidenced by the account agreement, Plaintiff agreed in writing to pay a flat fee when a check presented to Defendant for payment exceeded the collected balance in Plaintiff's account. In addition, Defendant ***1045** charged interest on overdraft sums to the extent that these sums exceeded collected balances in Plaintiff's account. FN3 The rate of interest charged was defendant's prime rate plus 3%, and, was subject to the maximum rate permissible by law.

> FN3 An overdraft is the payment by a bank from its funds of a check drawn on it by a depositor who does not have sufficient funds on deposit to pay the check. *See 1 Henry J. Bailey & Richard B. Hagedorn, Brady on Bank Checks: The Law of Bank Checks* 19.01, at 19-2 (rev. ed.1997).

Throughout the history of the parties' banking relationship, several checks were presented for payment against Plaintiff's account when the account contained insufficient funds to cover the checks. Pursuant to the deposit agreements and the bank's policies, which policies were incorporated into the deposit agreement between the parties, Defendant exercised its option to either honor or dishonor the checks. If a check was honored, and overdraft fee was permitted to exist in Plaintiff's account. If Defendant chose not to honor the check, it was returned unpaid. Plaintiff's account history reflects that, pursuant to this practice, out of a total of 212 checks presented when insufficient funds existed in Plaintiff's account, ninety-two checks were honored, while 120 checks were returned.

According to Defendant's schedule of fees, a flat, per item fee was charged against Plaintiff's account whether the check

was honored or returned. From January 1, 1995 through June 31, 1995, checking account customers, including Plaintiff, were charged a flat fee of $25 for all overdrafts or checks returned for insufficient funds. That fee increased to $27 from July 1, 1995 through the duration of Plaintiff's relationship at Defendant's institution. There was no relation between the flat fee charged and the amount of the check, overdraft, or period of time the overdraft existed in the account. The interest charged against the account for overdrafts was calculated on the basis of the average daily overdrawn account balance.

Plaintiff alleges that the periodic charges for interest, when aggregated with the overdraft fees, constitute "interest" in excess of the lawful amount allowed under the Bank Act. According to Plaintiff, Defendant assessed "interest" in excess of $18000 on an average annual overdraft balance of approximately $6000, a total of over 3000% in interest.

Upon Plaintiff's demand for the "excess interest," Defendant refused to refund any monies, on the basis that the "not sufficient fund fee"(the "NSF fee") and the OD fee were administrative charges, commonly utilized in the banking industry to cover processing charges and to deter depositors form overdrawing their accounts. Defendant contends that NSF and OD fees do no constitute "interest" within the meaning of the usury provisions of the Bank Act, and therefore, Plaintiff cannot avoid its contractual obligations by claiming protection under the usury laws.

II. Standard for Summary Judgement

Rule 56(c) of the Federal Rules of Civil Procedure authorizes entry of summary judgement where the pleadings and supporting materials demonstrate there is no genuine issue as

to any material fact and that the moving party is entitled to judgement as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is one that might affect the outcome of a suit under the governing law. *Id.* A plaintiff cannot defeat a defendant's properly supported motion for summary judgement without an affirmative presentation of specific facts showing a genuine issue, and may not merely rely on the general allegations of the pleadings. *Id.* A mere scintilla of evidence is insufficient to defeat a motion for summary judgement:

[I]n every case, before the evidence is left to a jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed *Id.* at 251, 106 S.Ct. 2505. In reviewing a motion for summary judgement the court focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that ***1046** one party must prevail as a matter of law." *Allen v. Tyson Foods, Inc.* 121 F3d 642, 646 (11th Cir.1997) (quoting *Anderson, supra*).

In *Celotex Corp. V. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the Supreme Court established a two-prong framework of shifting burdens which must be employed by federal courts in determining whether there exists a genuine issue precluding summary judgment. This framework places the initial burden on the moving party to establish the absence of a genuine issue as to any material fact. *Tyson Foods, Inc.*, 121 F3d at 646 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 26 L.Ed.2d 142 (1970)). The moving party may discharge this burden by "showing" that is, pointing out to the district

court that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U. S. at 325, 106 S.Ct. at 2554. In deciding whether the burden has been satisfied, the Court must view 'the evidence and all reasonable inferences arising from it in the light most favorable to the nonmoving party. *Tyson Foods, Inc.*, 121 F.3d at 646 (citing *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608).

Once the movant has satisfied its burden, the burden shifts to the nonmoving party to present evidence sufficient to make a "showing that the jury could reasonably find for that party." *Allen*, 121 F.3d at 646 (citations omitted). Facts asserted by the party opposing a summary judgement must be regarded as true if supported by affidavit or other evidentiary material. *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir.1981). However, where the nonmoving party bears the burden of proof of an essential element to the party's case, summary judgement is warranted when the party fails to make a showing sufficient to establish the essential element. *Celotex*, 477 U.S. at 323, 106 S .Ct. at 2552. "In such a situation, the can be 'no genuine issue as to any material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* The Eleventh Circuit commented on the nonmovant's burden For issues on which the non-movant would bear the burden of proof at trial, the means of rebuttal available to the non- movant vary depending on whether the movant put on evidence affirmatively negating the material fact or instead demonstrating an absence of evidence on the issue. Where the movant did the former, then the non-movant must respond with evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated. Where the movant did the latter, the non-movant must respond in one of two ways. First, he or she may show

that the record in the fact contains supporting evidence, sufficient to withstand a directed verdict motion, which was "overlooked or ignored" by the moving party, who has thus failed to meet the initial burden of showing an absence of evidence. *Celotex*, 477 U.S. at 332, 106 S.Ct. at 2557 (Brennen, J., dissenting). Second, he or she may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116-17 (11th Cir.1993). Ultimately, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Tyson Foods, Inc.*, 121 F.3d at 646.

III. Analysis and Discussion

The Amended Complaint, although not delineated as such, consists of a single count alleging that Defendant's practice of charging OD fees, in addition to assessing interest against the average daily overdrawn account balance, constituted usury. The parties agree that sole issue for determination is whether the OD fee was really "interest" that, when aggregated with the interest charged on the average daily overdrawn balance, was usurious.

Plaintiff does not challenge the interest rate charged against the average daily balance. Plaintiff only seeks a ruling that, since an overdraft situation amounted to the extension of credit - like a loan - the OD fee was actually "interest." Plaintiff argues that Defendant's characterization of the OD fee as ***1047** an administrative processing fee is pretext, because the amount of the fee exceeded the amount necessary for processing checks presented against an

overdrawn account. Thus, the Court addresses only the character of the OD fee and the propriety of Defendant's practice in assessing such fees.

Several issues must be addressed to reach a decision on the character and propriety of Defendant's OD fee. First, the Court must determine the controlling law for characterizing the fee. Plaintiff contends that, since Defendant is a nationally chartered bank, federal law, specifically the Bank Act and case law interpreting the Bank Act, applies, and that federal law preempts state law except as to the rate of interest the state allows a bank to charge its customers. Defendant avers that state law is not totally preempted. Defendant argues that state law governs not only the rate of interest which banks may legally charge, but also controls what constitutes "interest," as opposed to non-interest, administrative charges.

The second issue relative to resolving this non-factual dispute, which is dependant on the resolution of the preceding issue, is what is included within the meaning of "interest." Third, the Court must determine whether the payment of checks presented against an overdrawn account is an extension of credit, creating a loan transaction to which usury laws apply. The fourth, and ultimate, issue for the Court is whether the OD fees charged by Defendant are usurious, and whether any of the elements establishing usury require factual determinations, thereby precluding judgement as a matter of law and necessitating a trial.

Neither the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, nor any district courts therein, including the Southern District of Florida, nor any Florida state court have squarely addressed the specific issue before the Court. Although this action presents a case of first impression within this jurisdiction, ample analogous precedent exists to

support the conclusion that Defendant's OD fees are not interest which would create a usurious rate. Moreover, federal district courts within other circuits which have analyzed the difference between interest and administrative charges assessed by national banks have reached the same conclusion, and are persuasive. *See, e.g., Nicolas v. Deposit Guar. Nat'l Bank*, 182 F.R.D. 226 (S.D.Miss.1998); *Beech v. Trustmark Nat'l Bank*, No. 97cv187GR (S.D.Miss. Jan. 13, 1998).

A. The Purpose Behind the National Bank Act

[2] The National Bank Act was enacted to equalize the standing of national banks with their state-chartered competitors, and to prevent state legislatures from discriminating against national banks. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314, 99 S.Ct. 540, 548, 58 L.Ed.2d 534 (1978) (Congressional intent in providing that national banks "may....charge.....interest at the rate allowed by the laws of the State, Territory or District where the bank is located, ... and no more" was to allow national banks to compete with state-chartered banks and to give certain "advantages to National banks over their State competitors."). Section 85 of the Bank Act prescribes the amount of interest that a national bank may charge: Any association may take, receive, reserve, and charge on any loan .... interest at the rate allowed by the laws of the State .... where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more ...

12 U.S.C. § § 85. The remedy for charging a rate of interest in excess of that prescribed under § 85, which is regarded as

usurious, is the "forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid therein." 12 U.S.C. § 86.

1. The National Bank Act Does Not Absolutely Preempt State Usury Laws

[3] [4] Plaintiff contends that, as a nationally chartered bank, Defendant's practices are governed solely by federal law, and that state law only controls the actual rate of ***1048** interest, not what constitutes as "interest" in the context of usury prohibitions. However, the Bank Act does not contain an express statement that Congress intended to preempt state law in its entirety. In the absence of express statutory preemption, conflict preemption may be applied where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to achieving the intent of Congress. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 114 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). As with express preemption, conflict preemption will not be found unless it is the clear intent and purpose of Congress. *See CSX Transportation, Inc v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993): *see also California v. ARC America Corp.*, 490 U.S. 93, 100-01, 109 S.Ct. 1661,1665, 104 L.Ed.2d 86 (1989) (preemption of state law can be found only when "Congress intends that federal law occupy a given field," or when state law "actually conflicts with federal law, that is, when compliance with both state and federal law is impossible.... or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (quoting sources omitted.)

[5] Banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the

states, and thus, state legislatures may legislate in all areas not expressly or impliedly preempted be federal legislation. *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38, 100 S.Ct. 2009, 2016, 64 L.Ed2d 702 (1980); *First Nat'l Bank v. Missouri*, 263 U.S. 640 656, 44 S.Ct. 213, 215, 68 L.Ed. 486 (1924). In fact, federal courts have recognized that "national banks have traditionally been governed in their daily course of business far more by the laws of the State than the Nation. All [of] their contracts are governed and construed by State Laws." *National Bank V. Commonwealth*, 76 U.S. (9 Wall.) 353, 362, 19 L.Ed. 701 (1869). Except for a few instances in which Congress has explicitly preempted state regulation of national banks, "regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863." *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). Thus, the rule is that state laws apply, "the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair the efficiency to discharge [their] duties..." *McClellan v Chipman*, 164 U.S. 347, 357, 17 S.Ct. 85, 87, 41 L.Ed. 461 (1869); *see also Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248, 64 S.Ct. 599, 607, 88 L.Ed. 692 (1944) ("national banks are subject to state laws, unless those laws infringe the national banking laws or impose undue burden on the performance of the banks' functions").

[6] [7] Since Congress has not displaced all state legislation affecting national banks, state law will be preempted only "to the extent that it actually conflicts with federal law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621 78 L.Ed.2d 443 (1984). Courts must not lightly infer preemption, and its burden of the party claiming Congress intended to preempt state law to prove it.

See Gregory v. Ashcroft, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991) (the authority to displace a sovereign state's law is "an extraordinary power... that we must assume Congress does not exercise lightly"); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) (consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the states [are] not to be superceded by the Federal Act unless that [is] the clear and manifest purpose of Congress.").

2. Interpreting the Lawful Rate of Interest Under the National Bank Act

[8] [9] Through the Bank Act, Congress established a general system of regulations governing nationally-chartered banks and adopted state laws only as they fixed the amount of interest which could be charged. *See Evans v. National Bank of Savannah*, 251 U.S. 108, 111, 40 S.Ct. 58, 59, 64 L.Ed. 171 (1919). Although federal laws are frequently intended to have uniform nationwide ***1049** application, Congress may provide that federal enactments be interpreted by reference to state law. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 109 S.Ct. 1597, 1605, 104 L.Ed.2d 29 (1989). "Congress sometimes intends that a statutory term be given content by the application of state law." *Id.* In such instances, a federal court may properly use state law to fill in the gaps within a federal legislative scheme. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 107-09, 111 S.Ct. 1711, 1722-23, 114 L.Ed.2d 152 (1991).

[10] Plaintiffs assertion that state laws limiting bank service charges are preempted by the Bank Act's comprehensive federal statutory scheme governing the deposit-taking

function of national banks is palpably erroneous. There is no comprehensive federal statutory scheme governing the taking of deposits. Only one section of the Bank Act even relates to this function, and merely authorizes banks to accept deposits. *See* 12 U.S.C, § 24. This section may, by implication, also authorize banks to charge for deposit-related services as an incidental power necessary to carry on the business of receiving deposits But such implied authority does not constitute a regulatory scheme so comprehensive as to displace state law. *See Joy v. North*, 519 F.Supp. 1312, 1323 (D.Conn1981), reversed on other grounds, 692 F.2d 880 (2d Cir. 1982), *cert. denied sub nom., Citytrust v. Joy*, 460 U.S. 1051, 103 S.Ct. 1498, 75 L.Ed.2d 930 (1983) ("This section [12 U.S.C. § 24] simply sets forth the general corporate powers of associations. It does not provide that the powers therein are meant to preempt state law.").

The parties do not dispute that § 85 of the Bank Act expressly preempts all attempts by state legislatures to regulate the rate of interest which a national bank may charge in connection with a loan. This disagreement between the parties arises over the items and charges which are encompassed within the definition of the term "interest." "The question, at bottom, is one of statutory intent, and we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382, 112 S.Ct. 2031, 2036, 119 L.Ed.2d 157 (1992) (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 57, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990)). Thus, the issue of whether Florida law has been preempted by § 85 of the Bank Act necessarily involves a determination of the intent of Congress when it employed the term "interest" in drafting the Bank Act.

B. The Meaning of "Interest" As Contemplated in the Usury Prohibitions

Plaintiff alleges that the OD fees are "interest" under the Bank Act, and that the "interest" charged by Defendant, in the form of OD fees, exceeds that allowed by Florida law. Thus, Plaintiff alleges that Defendant's practices are usurious.

[11] [12] The Bank Act does not expressly define "interest rate" or "rate of interest" as used in § 85. Moreover, there is nothing in the legislative history of the Bank Act from which to glean a possible congressional intent to include the OD fees at issue within the definition of "interest." In the absence of an express definition or clear congressional intent, it is incumbent upon the Court to "begin with the language employed by Congress," and assume that the ordinary meaning of "interest" accurately expresses legislative purpose. *Morales*, 504 U.S. at 382, 112 S.Ct. at 2036; *see also CSX transportation,* 597 U.S. at 664, 113 S.Ct. at 1737; *FMC Corp.*, 498 U.S. at 57, 111 S.Ct. at 407. [W]here words are employed in a statue which had at the time a well-known meaning at common law or in the law of this country [,] they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons,* 434 U.S. 575,583, 98 S.Ct. 866, 871, 55 L.Ed.2d 40 (1978). Courts interpreting the meaning of "interest" must apply a "strict, that is literal construction" to avoid subjecting banks to double interest penalties under th Bank Act. *See Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 410, 21 L.Ed. 862 (1873).

Interest has been understood to include any compensation allowed by law or fixed by the parties for the use or

forbearance of ***1050** money, or the price which is fixed for the use of money. *See Deputy v. DuPont*, 308 U.S. 488, 498, 60 S.Ct. 363, 368, 84 L.Ed. 416 (1940). The common definition of "interest rate" has been held to be the "percentage of an amount of money which is paid for its use for a specified time." *Black's Law Dictionary* 730 (5th ed. 1979). Similarly, "interest" has been defined as "a charge for borrowed money[,] generally a percentage of the amount borrowed." *Webster's Ninth New Collegiate Dictionary* 630 (1989) (emphasis added). The plain and ordinary meaning of "interest" or "interest rate" does not include OD fees, NSF fees, and similar contingent or default charges. *See, e.g., United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 328, 83 S.Ct. 1715, 1722, 10 L.Ed.2d 915 (1963) (charges for banking services, "such as service charges for checking privileges, are free of governmental regulation, state or federal");*see also Lloyd v. Scott*, 29 U.S. (4 Pet.) 205, 226, 7 L.Ed. 833 (1830).

The determination of the maximum amount of interest which may be charged for the use of money loaned has always been within the police power of the state, and details of and exceptions to the legislation have rested with the discretion of the state legislature. *See Griffith v. Connecticut*, 218 U.S. 563, 568-69, 31 S.Ct. 132, 133, 54 L.Ed. 1151 (1910). In § 85 of the Bank Act, Congress expressly and unambiguously stated that a national bank was subject to the interest provision of the laws of the state in which the bank was located. Accordingly, Congress may look to the laws of the states to define the term "interest" as well as to set the allowable rate of interest. *See Tikkanen v. Citibank (South Dakota) N.A.*, 801 F.Supp. 270, 278 (D.Minn.1992).

1. Overdraft Fees on demand Deposit Checking Accounts Are Not "Interest"

[13] Even assuming that the Bank Act preempts state law regarding the characterization of interest considered usurious, which the Court does not concede is appropriate, Plaintiff's claim that the OD fees are interest and therefore are subject to usury laws must fail. As a threshold matter, except as the term "interest" relates to credit transaction, such as loans or credit card services, no provision of federal law discuses bank charges for NFS checks, or, for that matter, bank charges for any service performed for depositors of checking accounts.

"Interest" as used in the Bank Act includes: any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, over limit fees, annual fees, cash advance fees, and membership fees.....

12 C.F.R. § 7.4001(a) (1997). Because the OD fees were not imposed in connection with a credit transaction, the fees are not interest as defined by the Bank Act. FN4 Rather, the fee arises from the terms of the deposit agreements, which incorporate the schedule of fees. These types of charges are addressed by 12 C.F.R. § 7.4002, which provides:

> FN4 Although Plaintiff contends that the OD fees were actually imposed in exchange for the extension of credit for honoring a check drawn on accounts with insufficient collected balances, the Court has found otherwise. The finding is addressed in detail infra.

(a) *Customer charges and fees.* A national bank may charge

its customers non-interest charges and fees, including deposit account service charges.....

(b) *Considerations.* The establishment of non-interest charges and fees, and the amounts thereof, *is a business decision to be made by each bank, in its discretion, according to sound banking judgement and safe and sound banking principles.* A bank reasonably establishes non-interest charges and fees if the bank considers the following factors, among others:

(1) The cost incurred by the bank, plus a profit margin, in providing the service;

(2) The deterrence of misuse by customers of banking services;

***1051** (3) The enhancement of the competitive position of the bank in accordance with the bank's marketing strategy; and

(4) The maintenance of the safety and soundness of the institution.

(c) *Interest.* Charges and fees that are "interest" within the meaning of 12 U.S.C. § 85 are governed by § 7.4001 and not by this section.

The OD fees charged by Defendant are precisely those described in § 7.4002.

[14] Moreover, the fees at issue substantially satisfy the reasonableness factors set forth in 12 C.F.R. § 7.4002(b). Defendant's "Non-interest Income Project" report states that the bank's primary concern "is the extensive daily aggregate work effort by the branches and officers expended in the processing of NSF/OD transaction.... [which] requires substantial review and intervention by the branches and officers." Defendant determined that the decision to pay or return a check "sends a distinct message to the customer as to whether their behavior is to be encouraged or discouraged."

[15] Analyzing the pattern of customer behavior and recognizing the additional financial risk to the bank, Defendant concluded that, since the majority of potential overdraft checks are eventually honored, and the fact that the bank receives no additional fees when the item is presented a second time, honoring the check the first time provides little additional risk. Nevertheless, Plaintiff challenges Defendant's application of the considerations prescribed in § 7.4002(b), claiming that the fees are excessive for the services rendered. Plaintiff alleges that the cost analysis, based on the amount of the OD fee and the actual expense incurred by the Defendant for processing a overdrawn check, does not justify the amount of the fee imposed. However, Plaintiff has presented no evidence to substantiate its accusation that the OD fees were unconscionable and were imposed in contravention of the considerations required for analyzing and assessing the propriety of the fees. FN5

> FN5. Plaintiff complains that Defendant has not produced documentation of cost versus profit analysis. However, 12 U.S.C. § 484 provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal Law." Cases construing this section do not clarify when an unauthorized person or agency may, without violating this section, examine bank records for a limited purpose. *Compare Guthrie v. Harkness*, 199 U.S. 148, 157-59, 26 S.Ct. 4, 7-8, 50 L.Ed. (1905) *with National State Bank v Long*, 630 F.2d 981, 989 (3d Cir. 1980). Thus, it is possible that § 484 may serve to limit Plaintiff's ability to examine records by way of discovery. Nevertheless , Defendant has represented that the cost analysis records requested by Plaintiff do not exist. Therefore, Plaintiff was required to support its argument of the unreasonableness of the amount of the OD fee using other methods.

Even if Plaintiff proffered competent evidence of profit percentages, such evidence does not automatically prove that

the fees were unreasonable. In fact, the Code of Federal Regulations permit nationally chartered banks to recover the "cost incurred" for processing bad checks, "plus a profit margin." 12 C.F.R. § 7.4002(b)(1).

Additionally, national banks are required to set non-interest charges and fees based on the "maintenance of the safety and soundness of the institution." 12 C.F.R. § 7.4001(b)(4). Defendant's OD fees are a fair and efficient method of allocating the administrative costs consequent to processing checks presented against insufficient funds. Depositors who maintain insufficient balances create operational costs directly attributable to their failure to comply with the terms of their agreement. Banks must adopt systems to track such behavior and respond to it appropriately. Since banks must refrain from engaging on unsafe and unsound practices, *see* 12 U.S.C. § 1818(e), it is more than conceivable that a charge for overdrawn checks which is low enough to avoid attack as unreasonable would fail to discourage the writing of such checks. FN6

> FN6. The OCC has the authority to enjoin a bank service charge, or any other act of a national bank, considered to be an unsafe or unsound practice. *See* 12 U.S.C. § 1818(b). The Court is unaware of any instance in which this authority has ever been used to curb excessive bank charges.

2. Defendant's OD Fees Are Not Interest Under Florida Law

The Office of the Comptroller of the Currency has declared that the federal definition ***1052** of "interest" does not take precedence over the manner in which states define the term. See 12 C.F.R § 7.4001(c) ("The Federal definition of the term 'interest' does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law.") Therefore, if

certain fees are not considered interest "for purposes of evaluating compliance with state usury limitations .... when calculating the maximum interest that lending institutions may charge under those limitations," such fees are not deemed to be interest under federal law. *Id.*

[16] Applying Florida law, the OD fee charged by Defendant for the presentment of checks against an overdrawn account is not interest for the purpose of determining whether a transaction is usurious. Although the terms "fee" and "charge" in their legal acception, have a very broad meaning, as used generally, they refer to a price demanded for services rendered, " to fix or demand such a price, or any act by which the charging party manifests his purpose to demand the amount fixed or allowed for the [service]." *Benson v. First Trust & Savings Bank*, 105 Fla. 135, 142 So. 887, 891 (Fla. 1932).

Contrary to Plaintiff's assertion, Florida's formula for calculating interest on loans and credit advances belies the fact that the Defendant's OD fees are subterfuge for excessive interest. The rate of interest on Florida transactions is: calculated by first computing the advance or forbearance *as a percentage of the total stated amount of such loan.....* This percentage shall then be divided by the number of years, and fractions thereof, of the loan..... *according to its stated maturity date, without regard to early maturity in the event of default.* The resulting annual percentage rate shall then be added to the stated annual percentage rate of interest to produce the effective rate of interest for purposes of this chapter. § 687.03(3), Fla. Stat. (emphasis added).

The clear language of § 687.03(3) refers to the particular term stated on the face of a loan document. The statute

explicitly states that the calculation of unlawful rates of interest "shall apply only to loans and advances of credit." § 687.03(2)(b), Fla.Stat. Thus, Plaintiff's usury claim cannot stand unless Defendant's OD fees were a charge for receiving a loan or were incident or a condition for the extension of credit.

C. Honoring Checks on Overdrawn Accounts Is Not an Extension of Credit

Plaintiff argues that, by honoring checks for which insufficient funds exist in a checking account, Defendant was actually extending credit to Plaintiff. This extension of credit, according to Plaintiff, is synonymous with a loan. Therefore, the OD fee assessed on these "loans" constitutes interest. Accordingly, since the OD fee charged by Defendant exceeded the lawful rate of interest permitted in Florida, it was usurious.

Plaintiff relies heavily on *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed,2d 25 (1996), to support its contention that a loan was extended in connection with its checking account. The Court finds the Plaintiff's reliance on *Smiley* is misplaced.

The Smiley Court unanimously held that the word "interest" in § 85 was ambiguous and that the Comptroller's judgement as to its meaning was entitled to deference under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Ins.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Smiley*, 116 S.Ct. at 1732-33; *Doe v. Nortwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1301-02 (8th Cir. 1997). The court then concluded that the OCC's inclusion of credit card late fees within the meaning of "interest" was a reasonable interpretation of the

statute. *Smiley*, 116 S.Ct. at 1735. Because the law of South Dakota, Citibank's home state, permitted banks to charge late fees, the determination that the late fees are interest for the purposes of the Bank Act led to the dismissal of the state-law claims of Smiley, a California resident. *See id.* at 1732.

Here, the Court faces a different issue. The late fees at issue in *Smiley* arose from the Plaintiff's relationship with the bank as a *credit card holder*, an arrangement which***1053** unambiguously is based on "an extension of credit, making available of a line of credit, or any default breach by a borrower of a condition upon which credit was extended." 12 C.F.R. § 7.4001(a). A credit card holder fits neatly into the debtor role in a creditor/debtor relationship, which is essential to invoke § 85 of the Bank Act. In the instant case, Defendant's OD fees stem from deposit agreement between a bank and one or more of its depositors. Although a creditor/debtor relationship exists, the roles are reversed; the bank is a debtor and the depositor is the creditor. *MJZ Corp. v. Gulfstream First Bank & Trust, N.A.*, 420 So.2d 396,397 (Fla. 4th DCA 1982). Thus, the threshold question is whether th OD fees in this case are "connected with credit extension or availability," 12 C.F.R. § 7.4001(a), and accordingly, whether the usury laws apply at all.

Significantly, the *Smiley* Court approved the definition of "interest" found in 12 C.F.R. § 7.4001, which includes a reference to NSF charges. However, § 7.4001 clearly provides tht NSF fees are interest if, and only if, the fee is a "payment compensating a creditor..... for an extension of credit." 12 C.F.R § 7.4002(a). In the present case, the NSF and OD fees charged to Plaintiff were not compensating Defendant for an extension of credit. The fees were charged for the processing of bad checks. Thus, the holding and reasoning of the Supreme Court in *Smiley* is inapplicable.

This Court is without benefit of binding law to resolve this unique issue in Plaintiff's favor. Indeed, the federal cases which analyze the usurious nature of interest, and charges which can be incorporated into the calculation of interest, deal with the loans and similarly structured transactions. These transactions unambiguously entail the extension of credit. FN7 This, alone, raises suspicions about Plaintiff's novel argument. However, by analogy, case law exists which distinguishes loans from check transactions, and compels a determination that the payment of checks against an overdrawn account is not an extension of credit, and that the OD fee charged for such services is not interest.

FN7. *See, e.g., Citizens' Nat'l Bank v. Donnell*, 195 U.S. 369, 373-74, 25 S.Ct. 49, 49-50, 49 L.Ed. 238(1904) (charges for failure to pay a promissary note when due); *Cades v. H & R Block, Inc.* 43 F.3d 869 (4th Cir.1994) (flat charges for tax refund anticipation loans); *Fisher v. First Nat'l Bank*, 548 F.2d 255, 258-259 (8th Cir.1997) (cash advance fees on credit cards); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir.1972) (closing costs charged on real estate loans); *Panos v. Smith*, 116 F.2d 445, 446 (6th cir. 1940) (charges for mortgage taxes and recording fees); *Crinkleton v. Hall*, 66 F.2d 384, 387-88 (8th Cir.1933) (bonuses and commissions paid to a lender).

1. Loan Transactions Versus Checking Account Relationships

[17] Plaintiff would argue that the word "loan" is intentionally broad, and covers all circumstances in which there has been a *de facto* loan. Plaintiff urges that even defendant considers the honoring of checks drawn against overdrawn accounts an "unsecured extension of credit." Such a broad interpretation of this term places form over substance, in contravention of the intent and purpose behind the usury laws.

[18] Although a loan may exist regardless of the form of the transaction, "whether or not [a] transaction constitutes a loan, is to be determined from the surrounding facts in the particular case." *Calcasieu-Marine Nat'l Bank of Lake Charles v. American Employers' Ins. Co.*, 533 F.2d 290, 297 (5th Cir.1976) (quoting source omitted). FN8 Courts should not interpret the transaction in a manner which would defeat the probable intentions of the parties. *See id.* at 296

> FN8. The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

The classic definition of a loan is "a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows." *In re Grand Union Co.*, 219 F. 353, 356 (2d Cir.1914). Moreover, "to constitute a loan, there must be a contract whereby, in substance one party transfers to the other a sum of money which that other agrees to pay absolutely, together with such ***1054** *additional sums as may be agreed upon for its use." Id.* (emphasis added). Essentially, it is a contractual agreement between two parties.

[19] In contrast, a check "is a contract in writing by which the drawer contracts with the payee that the bank will pay to the payee therein the amount designated on presentation." *Sawgrass Builders, Inc v. Realty Coop., Inc.*, 172 Ga.App. 324, 323 S.E.2d 243, 244 (Ga.Ct.App.1984) (quoting source omitted). Unlike a loan note, which is a promise by the maker to pay a specified sum and described as a two-party instrument-the parties being the maker and a payee-a check constitutes an order on a third party, a bank, to pay a specified sum and is a three-party instrument- the parties being a drawer, a drawee or payor bank, and a payee. The differences between these types of instruments and

underlying transactions are apparent in the respective definitions promulgated in the Uniform Commercial Code. *Compare* UCC § 3-104(f) (1990) (definition of check) with UCC § 3-104(e) (1990) (definition of note).

The Supreme Court has noted the dichotomy between loan documentation and checks. *See Don E. Williams Co. v. Commissioner of Internal Revenue*, 429 U.S. 569, 97 s.Ct. 850, 51 L.Ed2d 48 (1977). In that case, the Court declared that:

The promissary note, even when payable on demand and fully secured, is still, as it name implies, only a promise to pay, and does not represent the paying out or the reduction of assets. A check, on the other hand, is a direction to the bank for immediate payment, is a medium of exchange, and has come to be treated for federal tax purposes as a conditional payment of cash.

Id. at 582-83, 97 S.Ct. at 858.

When a bank honors a check, it is reasonably expects the check to be paid in the normal course of business. *See Pioneer Valley Sav. Bank v. Indemnity Ins. Co.*, 225 F.Supp. 404, 411 (N.D.Iowa 1964), *aff'd*, 343 F.2d 634 (8th Cir.1965). Checks, as the most common items handled by banks, are handled in bulk as cash items on the assumption that they will be honored in most cases; provisional credits are entered immediately at all stages of the collection process, and become final without further action upon payment by the drawee bank. *See Calcasieu-Marine Nat'l Bank*, 533 F.2d at 300 (citation omitted).

The Court cannot agree with Plaintiff's argument that the deposit agreement relative to Plaintiff's checking account treats an overdraft as an application for advance credit. The implementation of OD and NSF fees was based on the

banking industry's awareness that a depositor often writes checks under the mistaken belief that he has, or will have, sufficient funds to cover the check, without any intent to apply for credit. The imposition of the fee is solely contingent upon the depositor's failure to comply with the terms of the deposit agreement, which require the maintenance of sufficient funds to cover all checks presented.

2. Contingent Default Fees Are Not Interest

There is a significant body of law establishing that fees imposed as a result of a contingency are not considered interest in divining a violation of the usury laws. Prior to the passage of the Bank Act in 1864, the U.S. Supreme Court examined the dichotomy between " interest rates" and "contingent default charges," and determined that the latter are not interest for the purposes of § 85. *See Lloyd v. Scott,* 29 U.S. at 226. In addressing whether late fees constituted interest, the Court held that:

If a party agree[s] to pay a specific sum exceeding the lawful interest, provided he do[es] not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered a penalty. *Id.* Accordingly, a fee, even when calculated according to a percentage of the amount owed, is not rendered usurious by a depositor's agreement to pay for the fee contingent upon his delinquency, because the payment or non-payment of that fee is completely within the depositor's control.

One year prior to the enactment of the Bank Act, the Supreme Court once again spoke to dissimilarities between interest ***1055** rates and contingent default charges, and stated that when "[t]he payment of anything additional

depends also upon a contingency, and not upon any happenings of a certain event, [such is] insufficient to make a loan usurious." *Spain v. Hamilton's Administrator*, 68 U.S. (1 Wall.) 604, 626, 17 L.Ed .619 (1863).

These cases stand for the proposition that only where the charge is required for the loan, and not where it is contingent on the happening of an uncertain event, will the charge be considered "interest." Because Congress is presumed to have adopted the federal common law meaning of "interest" in enacting § 85, *see Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81, 95 S.Ct. 1180, 1184, 43 L.Ed.2d 469 (1975), the statute cannot be interpreted to include contingent default charges within the depositor's control, such as the OD fees imposed by the Defendant in this case.

The logic behind this distinction is clear. If charges and fees within the depositors control, such as the OD fees in dispute, are deemed "interest," banks could not possibly know whether the ultimate rate on any given account would exceed the interest ceiling provided by law. The depositor could, therefore, render his account usurious, and hence unlawful, by simply maintaining insufficient funds in the account, thereby incurring an amount of fees equal to a usurious rate.

[20] In the absence of clear congressional intent to the contrary, the Court finds that the term "interest rates" or "rates of interest" as used in § 85 of the Bank Act ought to be construed in compliance with the term's plain and ordinary meaning, and its well entrenched federal common law meaning, so as not to include contingent default fees. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-22, 112 S.Ct. 2608, 2620, 120 L.Ed.2d 407 (1992).

3. Florida Is in Accord Regarding the Assessment of Contingent Default Fees

[21] Florida courts adhere to Supreme Court precedent, and do not characterize fees received for participating in uncertain transactions as interest for purposes of usury determinations. *See, e.g., Kraft v. Mason*, 668 So.2d 679, 684 (Fla. 4th DCA 1996). Repeatedly, those courts have found that an agreement to pay fees is not usurious when payment depends on a contingency. *See, e.g., Bailey v. Harrington*, 462 So.2d 861 (Fla. 3d DCA), *review denied*, 472 So.2d 1180 (Fla. 1985).

Plaintiff admits that "[t]he charging of the 'Overdraft Item Fee' was *a condition* of the extension of credit when the Bank allowed a customer to overdraw their account." Plaintiff's Motion for Summary Judgement, at page 10 (emphasis added). It was within Plaintiff's control to avoid the OD fees. Reviewing the record before the Court, it is clear that no part of the deposit agreement contains a promise to pay anything absolutely in addition to the amount of the check presented against Plaintiff's account. The payment of anything additional depends entirely on a contingency, and not upon any happening of a certain event, which of itself is insufficient to make Defendant's OD fee usurious. FN9 Accordingly, Plaintiff's contention that Defendant's OD fee is a subterfuge for charging a usurious rate of interest must fail.

> FN9. This holding is consistent with a Texas Supreme Court ruling cited by Defendant. *See First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.w.2d 285 (Tex.1994). In determining whether NSF fees constituted interest, the Texas Supreme Court held that "[f]ees which are an additional charge supported by a distinctly separate and additional consideration, other than the simple loaning of money, are not

interest and thus does not violate the usury laws." *Id.* at 287. Although the decision is not binding on this Court, since it is a decision by a state tribunal and involved in a state chartered, as opposed to a national, bank, the fact that the OCC as well as other federal courts have cited *Tony's Tortilla* with approval, *see, e.g., Terrell v. Hancock Bank*, 7 F.Supp.2d 812, 817 (S.D.Miss.1998), it is persuasive in determining how Plaintiff's usury claim would be resolved by a Florida court.

D. The Propriety of Summary Judgement

Having determined that state law controls not only the rate of lawful interest that a bank, national or state-chartered, may charge, but also the classification of charges ***1056** subject to the usury laws, the Court must determine whether judgement as a matter of law is appropriate. Applying Florida's elements for establishing a cause of action for usury to the circumstances raised in this record, permits a legal resolution of the matter. Thus, resolving the issue by summary judgment is appropriate.

1. Elements of a Usury Claim

[22] [23] Florida law set forth four elements necessary to substantiate the usurious nature of a transaction. To establish usury, there must be: (1) a loan, either express or implied; (2) an understanding between the lender and the borrower that the money must be repaid; (3) a greater rate of interest than allowed by law; and (4) corrupt intent on the part of the lender to make more than the legal rate of interest for the use of the money loaned. *See Dixon v. Sharp*, 276 So.2d 817, 89 (Fla.1973); *see also Lloyd*, 29 U.S. at 224 (establishing the elements of usury under the federal common

law). The party challenging the rate of interest and claiming usury has the burden of establishing these elements. *See Dixon*, 276 So.2d at 820; *Swanson v. Gulf West Int'l Corp.*, 429 So.2d 817, 819 (Fla. 2d DCA 1983); *see also In re Concrete Express, Inc.*, 87 B.R. 718, 721 (Bankr.S.D.Fla1998). In this case, Plaintiff has the burden of proof on all elements of the prohibition to sustain a finding of usury under § 687.02 of the Florida Statutes.

[24] Having extensively discussed the dichotomy between interest and administrative fees, it is unnecessary to belabor this point. The Court has also addressed the differences between a loan and a non-loan transaction, such as a simple checking account, and has determined that honoring a check presented against an account with insufficient funds is not an extension of credit. This finding is buttressed by observing that Defendant charged the same fee whether it honored or rejected a check for payment form Plaintiff's checking account. By rejecting the check, it cannot be said that credit was extended for the use of such funds. Thus, there is no support for Plaintiff's argument that the character of the fixed OD fee is different from the NSF fee, and is, therefore, interest for the purpose of determining usury. Consequently, Plaintiff has failed to establish the first and third elements of an action for usury.

[25] Even assuming Plaintiff could provide a legal basis to support its contention that the honoring of the subject checks was actually an advance of money in the form of a loan, that the OD fees are a form of interest under Florida law, and that the aggregation of the interest calculated on the amount by which the overdraft exceeded the collected balance and the OD fee created a rate of interest in excess of the lawful rate, Plaintiff cannot prevail on its usury claim. Having failed to meet its burden of proving Defendant had a purposeful intent to violate the law, Plaintiff has not satisfied the fourth

element necessary to sustain its cause of action.

2. Plaintiff Has Not Established Corrupt Intent on the Part of Defendant

Understanding the purpose behind the enactment of the usury laws is helpful in determining whether a transaction is usurious, providing a legal remedy to an injured debtor. In passing Florida's usury statue, the legislature sought to"bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." *Chandler v. Kendrick,* 108 Fla. 450, 146 So. 551, 552 (Fla.1933); *see also Cesary v. second Nat'l Bank of North Miami,* 369 so.2d 917, 921 (Fla.1979). In sum, Chapter 687 of the Florida Statutes was designed to protect borrowers from paying unfair and excessive interest to creditors who knowingly and willfully charge or receive interest in excess of 25% per annum. *See Jersey Palm-Gross, Inc. v. Paper*, 658 So.2d 531, 534 (Fla.1995). FN10

> FN10. Although Plaintiff contends that the Defendant's profit margin on OD fees exceeded the cost of processing overdrawn checks, resulting in deceptive and usurious practices, Plaintiff has " failed to show that [it was] deprived of a meaningful choice of the banks with which [it] could do business and that the terms of the agreements with [Defendant] were unreasonably favorable to the bank." *Jacobs v. Citibank, N.A..*, 61 N.Y.2d 869, 872, 474 N.Y.S.2d 464, 462 N.E.2d 1182 (N.Y.1984) (upholding summary judgement for the defendant bank in a suit attacking NSF check charges). Thus, Plaintiff has not portrayed itself as a "necessitous borrower."

***1057** A crucial ingredient necessary to constitute the offense of usury is the intent with which the act is done. *See Lloyd,* 29 U.S. at 224. Although "ignorance of the law will not protect a party from the penalties of usury where it is committed.... where there was no intention to evade the law"

and the facts show that an unlawful rate of interest was "the result of a mistake or accident, no penalty attaches." *Id.*

[26] Penalties for the commission of usury are only imposed on lenders who "willfully" violate the statute. *See* 687.04, Fla.Stat. To be willful, the act must proceed from "a conscious motion of the will, intending the result which actually comes to pass." *Chandler,* 156 So. at 552. As distinguished from inadvertent conduct, usury is "restricted to such acts are done with an unlawful intent." *Id.* A determination of usury is not predicated on "whether the lender actually gets more than the law permits, but whether there was a *purpose in his mind* to get more than legal interest for the use of his money, and whether, by the terms of the transaction and the means of the employed to effect the loan, he may be its enforcement be enabled to get more than the legal rate." *Id.* (emphasis added); *see also Dixon,* 276 So.2d at 820-21 ("usury is largely a matter of intent, and is ..... determined by existence of corrupt purpose in the lender's mind to get more than legal interest for the money lent.... [and] from the circumstances surrounding the entire transaction.").

[27] Generally, the question of intent is one of fact. However, in this instance, where there is no conflict of material facts, the question is one of law for the Court. *See, e.g., Atlantic Coast Line R.R. Co. v. Boone,* 85 So.2d 834, 842 (Fla.1956); Richmond v. Florida Power & Light Co., 58 So.2d 687, 688 (Fla.1952); *United States Rubber Prods. v. Gulf Lines Ins. Co.,* 429 So.2d 744, 746 (Fla. 3d DCA 1983); *see also Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1103 (5th Cir.1981) (citing *Atlantic Coast Line R.R. Co.*, supra). Again, Plaintiff had the burden of proving Defendant had a "corrupt intent" to violate the usury statute at the time it honored the check and charged the OD fee, or

alternatively, at the time it entered into the deposit agreement with Plaintiff.

Plaintiff has not produced even a scintilla of evidence that Plaintiff falls into the class of borrowers deemed necessitous or that the Defendant took advantage of Plaintiff's condition in setting its OD fees. In this instance, it was Plaintiff who instigated the imposition of the OD fees. By maintaining sufficient funds in its account, Plaintiff could have avoided the payment of the OD fees. No one could have known at the inception of the banking relationship the total amount Plaintiff would be responsible for compensating Defendant for honoring checks presented against insufficient funds.

After carefully examining the record and the evidence proffered in support of Plaintiff's claim, the Court can find no demonstration of the necessary corrupt intent in Defendant's mind to get more than the legal rate of interest. Nor does the record reflect that this is a case of an overreaching lender taking advantage of a desperate borrower to impose undue or harsh terms. Thus, Plaintiff has failed to meet its burden of establishing a usury violation.

3. The Effect of a Usury Savings Clause

The absence of corrupt intent is further demonstrated by the express provisions in the deposit agreement. The schedule of fees, incorporated into the deposit agreement, contained a contractual disclaimer of any intent to violate usury laws. In defining the relationship between the parties and their respective obligations for "Overdraft Balances," the agreement explicitly stated that:

The following accounts are charged the NationsBank Prime Rate plus 3% *(subject to the maximum rate permissible by Law)* for overdraft collected balances: *Simple Analysis*

Business Checking.....

Defendant's Schedule of Fees (emphasis added).

***1058** [28] [29] A provision in a loan agreement which attempts to negate the effects of other provisions that might otherwise result in the extraction of an illegal rate of interest constitutes a "usury savings clause." *See Jersey Palm-Gross,* 658 So.2d at 534. although the presence of a savings clause does not definitively insulate a lender against a usury violation, it can be considered as one factor in determining whether a lender possessed the intent to exact a usurious interest rate. *See id.* at 535

In fact, some courts have acknowledged that "provisions in loan documents limiting the amount of interest payable to that authorized under applicable law have been recognized as valid and enforceable in this state and provide a complete defense to a charge of usury." *First American Bank & Trust v. International Medical Centers, Inc.,* 565 So.2d 1369, 1374 (Fla. 1st DCA 1990), *review denied,* 576 so.2d 286 (Fla.1991). FN11 Florida's Supreme Court has held that "savings clauses serve a legitimate function in commercial loan transactions and should be enforced in appropriate circumstances." *Jersey Palm-Gross*, 658 So.2d at 535. In affirming the lower court's determination regarding the efficacy of a savings clause, the court stated that "where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency, the clause may be determinative on the issue of intent." *Id. (citing Jersey Palm-Gross, Inc. v. Paper,* 639 So.2d 664, 671 (Fla. 4th DCA 1994).

> FN11. Without discussing the law concerning usury savings clauses, the bankruptcy court for the Southern District of Florida Held that while a savings provision "by itself is insufficient to

> avoid an adjudication of usury, it is credible evidence of the parties' intention that usurious interest not to be present in the agreement." *See In re Concrete Express, Inc.*, 87 B.R. at 719.

The scenario described by the Florida Supreme Court for considering whether a savings clause negates the intent element of an usury violation mirrors the circumstances in the instant case. The savings clause in the deposit agreement implied that if the amount of interest charged against an overdrawn account ultimately resulted in the violation of Florida's usury laws, then the transaction would be recalculated and restructured to eliminate any usury violation, and any excessive interest already paid would be returned to Plaintiff.

In sum, Defendant's representation that the charges for checks presented against overdrawn accounts would not exceed "the maximum rate permissible by law," and the fact that the transaction was not usurious until an unanticipated contingency occurred, defeats any assertion by Plaintiff that Defendant possessed the intent to assess a usurious rate of interest. Absent proof of Defendant's corrupt intent, Plaintiff cannot avoid summary judgement on the issue.

III. Conclusion

The primary objective of the Bank Act was to enact a federal usury law for national banks. This measure, codified at 12 U.S.C. §§ 85 and 86, prescribes an interest rate ceiling and federal remedy for usury. It also protects national banks from discriminatory state usury laws under the "most favored lender" doctrine articulated by the U.S. Supreme Court. *See Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 410, 21 L.Ed. 862 (1873). Discriminatory state usury laws are not at issue in this case.

Neither the Bank Act nor any other federal statute considers whether the provisions in contracts between banks and their customers may exact unreasonable or unconscionable fees. Plaintiff's preemption argument, consequently, is essentially an argument that even though the federal government has largely declined to regulate this area, Congress has nevertheless decided to preclude state regulation. The Court finds this argument is simply untenable.

[30] The explicit language of the Bank Act does not speak to charges for processing checks presented against overdrawn accounts. The legislative history reveals no evidence of congressional intent to displace state law regarding charges or payments other than for interest. Moreover, the Court is unable to find that Congress, when it used the phrase " interest at the rate" in enacting § 85 of the Bank Act, intended anything other than the ordinary and popular meaning ***1059** of the word "interest." Thus, in the Court's view, § 85 does not preempt all state laws dealing with charges and fees not commonly included in the term "interest."

Another reason Plaintiff's claim must fail is that agreements to pay charges only in the event of a contingency are not usurious. Policy concerns illustrate that limiting the ability of banks to charge OD fees on checking accounts is inefficient because those individuals who cause the expense associated with such behavior would then be required to pay for the consequences of their conduct. Instead, banks would be forced to increase service and processing compensation in another manner. Many depositors who would be paying these increased amounts maintain sufficient funds in their accounts and do not cause overdrafts. Forcing banks to recover cost created dy depositors, such as Plaintiff, from all depositors provides, in short, an economic subsidy for those who do not comply with the terms of their deposit

agreements. This inequitable result would be exacerbated by the fact that the number of overdrawn accounts would increase as the costs to these depositors decrease.

In sum, as a matter of law, the Court finds that the payment of OD fees as consideration for honoring checks presented against overdrawn accounts is not the payment of interest under the deposit agreement. The OD fees at issue are the antithesis of a loan, by putting an end to credit instead of giving it. The manner by which Defendant computed the amount of consideration for Plaintiff's right to overdraw its account does not affect its characterization as a usurious interest charge. Defendant was lawfully entitled to compensation for the services rendered for processing the checks and was a condition Plaintiff contractually agreed to pay.

Defendant has presented evidence in support of its contention that, in exchange for the imposition of the OD fee, it performed several processing functions other than those of a straight loan transaction. In the commercial context, the value of the services performed was clearly in excess of the amount necessary to remove any taint of usury. Plaintiff's business benefitted by Defendant's decision to honor the checks. In contrast, Plaintiff presented no evidence to show that the fee charged was unfair or unreasonable for the services Defendant performed and that the OD fee was not for services rendered as opposed to a hidden interest charge.

Moreover, the Court is unable to find a sufficient basis for Plaintiff's allegation that the OD fee was but a device to violate the statute condemning usury. Although neither party has pointed to any controlling case law specifically on point, the Court feels it is entirely proper to bear in mind not only the letter but the spirit of the usury law and its prime

purpose to protect needy borrowers by penalizing unconscionable money lenders. *See Chandler,* 146 So. at 552.

Based on the foregoing, NationsBank's Motion for Final Summary Judgement is granted. Plaintiff, Video Trax, Inc.'s Motion for Summary Judgement is denied. As this Order disposes of all issues raised in this action, all pending motions are denied as moot.

S.D.Fla.,1998.
Video Trax, Inc. v. NationsBank, N.A.
33 F.Supp.2d 1041

APPENDIX F

Banks use process to cash in on overdraft fees

BY KATHY CHU
USA TODAY

As we write checks and use our debit cards this holiday season, banks are forcing some of us to overdraw more often by clearing the largest transactions first, instead of processing them in the order they come in.

Eight of the nation's 10 largest banks Citigroup, Bank of America, Chase, Wachovia, Wells Fargo, HSBC, U.S. Bank and SunTrust typically pay checks that arrive on the same day from the largest to smallest dollar amount, according to USA TODAY research. Most large banks do the same with electronic transactions, according to a review of deposit agreements and conversations with the banks.

The order in which banks process checks and other debits determines the overdraft fees they charge. Those fees make up 90% of service charges on deposit accounts, and they're expected to yield a record $53.1 billion for financial institutions this year, research firm Moebs Services says.

Banks have been increasingly relying on fees because in recent years the gap between the money they earn on products such as mortgages and what they pay out on deposits such as CDs and money market accounts has narrowed.

A disproportionate number of these overdrafts occur from November to January, because, "People are going out more and buying more," says Michael Moebs, founder of Moebs Services.

Here's how high-to-low check processing works: Say you have $50 in the bank. And suppose three checks come in on the same day: for $20, $15 and $45. The bank would clear the $45 one first.

See Banks, 2C

Some states set banking rules for checks

Banks, from 1C

That way, it could charge you a fee, of up to $35, for each of two checks bouncing. If it had cleared the lowest-amount check first, you'd incur only one bounced-check fee.

Critics denounce this practice, saying it boosts fee income to banks at the expense of low-balance customers who can least afford extra fees. A handful of states, including New York, have passed laws requiring banks to specify the order in which they clear transactions.

"There is no excuse to process the transactions this way," says Jean Ann Fox of the Consumer Federation of America. "The only reason is to charge more fees."

Banks concede that this policy can cause people to pay higher fees. They explain that they want to give priority to their customers' largest checks.

"Their mortgage payment is the last check they want to bounce," says John Hall, spokesman for the American Bankers Association. "There are severe penalties and embarrassment."

Sean Tucker, 29, would rather have his items paid in the order they come in to the bank. In September, Bank of America charged him six overdraft fees, totaling nearly $200, for debits and checks that started at $3.33. Tucker says he found it "strange" that the bank cleared debits and checks from highest to lowest dollar amount.

"That suggests they've got some system to extract as many bounced-check fees as possible," says Tucker, of Falls Church, Va.

Diane Wagner of Bank of America says she can't comment on Tucker's case but says, in general, "Customers prefer to have transactions processed from high to low."